92-129

No. 92-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARK T. MOLZER,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether Ill. Rev. Stat., ch. 144, pars. 221 and 222, are unconstitutional as violative of guarantees of free speech and due process of law set forth in the First, Fifth and Fourteenth Amendments to the United States Constitution.

Whether Ill. Rev. Stat., ch. 144, pars. 221 and 222 are unconstitutional as violative of the guarantee of equal protection of the laws set forth in the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW ... i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW vi

JURISDICTIONAL STATEMENT vii

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE viii

STATEMENT OF FACTS 1

ARGUMENT 3

I. THE ILLINOIS HAZING STATUTES, AS CONSTRUED BY THE ILLINOIS SUPREME COURT, REMAIN UNCONSTITUTIONALLY OVERBROAD AND VAGUE, THUS VIOLATING THE GUARANTEES OF FREE SPEECH AND DUE PROCESS OF LAW SET FORTH IN THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . 3

II. THE ILLINOIS HAZING LAW IS FUNDAMENTALLY FLAWED BECAUSE THERE ARE AVAILABLE LESS RESTRICTIVE MEANS TO REGULATE THE TYPES OF ACTIVITY THAT CAUSE INJURY, BUT WHICH DO NOT IMPLICATE FREEDOM OF SPEECH AND ASSOCIATION 23

III. THE ILLINOIS HAZING STATUTES CONTAIN GOVERNMENT CLASSIFICATIONS WHICH ARE VIOLATIVE OF GUARANTEE OF EQUAL PROTECTION OF THE LAWS SET FORTH IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION . 27

CONCLUSION 30

APPENDIX

People v. Anderson, et al., 148 Ill.2d 15, 169 Ill.Dec. 288, 591 N.E.2d 461 (1992)..... A-1

People v. Anderson, et al., Circuit Court, 9th Judicial Circuit of Illinois, McDonough County, Case No. 90-CM-620 (1991)..... B-1

TABLE OF AUTHORITIES

CASES

Grayned v. City of Rockford,
408 U.S. 104 (1972) 4,14-15

Zwickler v. Koota,
389 U.S. 241 (1967) 4

Gooding v. Wilson,
405 U.S. 518 (1972) 5

Bigelow v. Virginia,
421 U.S. 809 (1975) 5

Donbrowski v. Pfister,
380 U.S. 479 (1965) 5

NAACP v. Button,
371 U.S. 415 (1963) 5,6

Kunz v. New York,
390 U.S. 290 (1950) 6

Lewis v. New Orleans,
415 U.S. 130 (1974) 6

Palsgraf v. Long Island R.R. Co.,
248 N.Y. 339 (1928) 13

Aston v. Kentucky,
384 U.S. 195 (1966) 15

Smith v. Goguen,
415 U.S. 566 (1974) 18-19

Shelton v. Tucker,
364 U.S. 497 (1960) 23

Elfbrandt v. Russel,
384 U.S. 11 (1966) 23

Police Dept. of Chicago v. Mosely,
408 U.S. 91 (1972) 28

Eisenstadt v. Baird,
405 U.S. 438 (1972) 28

STATUTES

28 U.S.C. § 1257 vii

ILL.REV.STAT., CH. 144, PAR.
221 ..... Passim

ILL.REV.STAT., CH. 144, PAR.
222 ..... Passim

ILL. REV. STAT., CH. 38, § 12-5 . 24

ILL. REV. STAT., CH. 38, § 9-3 .. 25

ILL. REV. STAT., CH. 38,
§ 1005-9-1 3

ILL. REV. STAT., CH. 38,
§ 1005-8-3..... 3

OTHER

Webster's New Collegiate
Dictionary (1977) 7-8

N. Nowak and R. Rotunda,
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Ed., 1991) 28

OPINIONS BELOW

People v. Anderson, et al., 148 Ill.2d 15, 169 Ili.Dec. 288, 591 N.E.2d 461 (1992).

People v. Anderson, et al., Circuit Court, 9th Judicial Circuit of Illinois, McDonough County, Case No. 90-CM-620 (1991).

JURISDICTION OF THIS COURT

The judgment below was entered and filed on April 16, 1992. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. §1257, because Petitioner raised and preserved, and the highest court of the State specifically rejected, a constitutional claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

UNITED STATES CONSTITUTION, AMENDMENT I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right to the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILL.REV.STAT., CH. 144, PARS. 221 AND 222.

221. Hazing as Class B misdemeanor.

§ 1. Whoever shall engage in the practice of hazing in this state, whereby anyone sustains an injury to his person therefrom, shall be guilty of a Class B misdemeanor.

222. Hazing defined.

§ 2. The term "hazing" in this act shall be construed to mean any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others.

ILL. REV. STAT., CH. 38, § 9-3.

Involuntary Manslaughter and Reckless Homicide

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

(b) Sentence

(1) Involuntary manslaughter is a Class 3 felony.

(2) Reckless homicide is a Class 4 felony.

ILL. REV. STAT., CH. 38, § 12-5.

Reckless Conduct

(a) A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.

(b) Sentence

Reckless conduct is a Class A misdemeanor.

ILL. REV. STAT., CH. 38, § 1005-9-1.

Authorized fines

§ 5-9-1. Authorized Fines. (a) An offender may be sentenced to pay a fine which shall not exceed for each offense:

. . .

(2) for a Class A misdemeanor, $1,000;

(3) for a Class B or Class C misdemeanor, $500;

. . .

ILL. REV. STAT., CH. 38, § 1005-8-3.

Sentence of imprisonment for misdemeanor

§ 5-8-3. Sentence of Imprisonment for Misdemeanor. (a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:

. . .

(2) for a Class B misdemeanor, for not more than 6 months;

. . .

STATEMENT OF FACTS

Mark T. Molzer was a student at Western Illinois University and a member of the Western Illinois University Lacrosse Club. On October 18, 1990, during the course of an event known as "Rookie Day," veteran lacrosse members led nine rookies through a series of initiation rituals, some of which included the consumption of alcohol. Although the consumption of alcohol was clearly made to be an optional part of the initiation ceremony, Nicholas E. Haben consumed a large quantity of alcohol and, as a result, died during the morning of October 19, 1990, of acute alcohol poisoning.

A two-count information was filed against Defendants on November 2, 1990. In Count II, Molzer and eleven others were charged with hazing. The circuit court

dismissed Count II on the grounds that the hazing statute was unconstitutionally overbroad and vague, in violation of the First and Fourteenth Amendments of the United States Constitution. The State appealed and, in an opinion filed on April 16, 1992, the Illinois Supreme Court held that the statute, as interpreted by the court, was not unconstitutionally overbroad or vague. This timely petition followed.

ARGUMENT

The Illinois hazing statute provides that "whosoever shall engage in the practice of hazing in this state, whereby anyone sustains an injury to his person therefrom, shall be guilty of a Class B misdemeanor." Ill. Rev. Stat. 1989, ch. 144, par. 221. Hazing is defined as "any pastime or amusement . . . whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others." Ill. Rev. Stat. 1989, ch. 144, par. 222. A Class B misdemeanor carries maximum penalties of six months' imprisonment (Ill. Rev. Stat. 1989, ch. 38, par. 1005-8-3(a)(2)) and a fine of $500 (Ill. Rev. Stat. 1989, ch. 38, 1005-9-1(a)(3)).

I. THE ILLINOIS HAZING STATUTES, AS CONSTRUED BY THE ILLINOIS SUPREME COURT, REMAIN UNCONSTITUTIONALLY OVERBROAD AND VAGUE, THUS VIOLATING

THE GUARANTEES OF FREE SPEECH AND DUE PROCESS OF LAW SET FORTH IN THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Overbreadth

It is well-established that a statute is unconstitutionally overbroad if that statute may reasonably be interpreted to prohibit conduct which is constitutionally protected. Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972). "In attempting to control or prevent activities which are subject to state regulation, the legislature must not use means which sweep too broadly and thereby penetrate the area of protected freedoms." Zwickler v. Koota, 389 U.S. 241, 250 (1967). If such overly broad statutes are not invalidated by the courts, "persons whose expression is constitutionally protected may well refrain from exercising their rights for

fear of criminal sanctions provided by a statute susceptible of application to protect the expression." Gooding v. Wilson, 405 U.S. 518, 521 (1972).

A defendant's standing to challenge a statute on First Amendment grounds as facially overbroad has been held not to depend upon whether his own activity is shown to be constitutionally privileged. Bigelow v. Virginia, 421 U.S. 809, 815-18 (1975). The validity of an overly broad statute may be contested "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with requisite narrow specificity." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). As explained in NAACP v. Button, 371 U.S. 415 (1963):

> [T]he instant decree may be invalid if it prohibits privileged

> exercises of First Amendment rights ***whether or not*** the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

371 U.S. 415, 432. [Emphasis added.]

These principles of law have been repeatedly applied by this court to invalidate various statutes which, at least in part, criminalized constitutionally protected speech and/or conduct. See, e.g., Kunz v. New York, 390 U.S. 290 (1950) (held ordinance making it unlawful to ridicule or denounce any form of religious belief in the street without a permit violated First and Fourteenth Amendments); and, Lewis v. New Orleans, 415 U.S. 130 (1974) (statute making it a criminal offense "for any person wantonly to curse or

revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in actual performance of his actual duty" was held to be unconstitutional).

With regard to the statutes presently before this Court, the operative phrase found in paragraph 222, Hazing Defined, is "ridicule for the pastime of others." The word "ridicule," by its very definition, connotes pure speech or expressive conduct. The complete phrase, "ridicule for the pastime of others," conjures up enumerable images of constitutionally protected activities, including examples of pure speech.

To illustrate, two standard artistic formats of theater, literature and music are parody and satire. Webster's New Collegiate Dictionary (1977) defines

"parody" as a "literary or musical work in which style of an author or work is closely imitated for comic effect or in ***ridicule***." [Emphasis added.] (Webster's, at 834.) The same source defines "satire" as a "literary work holding up human vices and follies to ***ridicule*** or scorn." [Emphasis added.] (Webster's, at 1026.) In perhaps a less classic sense, comedians and cartoonists regularly engage in the ridicule of celebrities, political figures, and other persons or ideas; and from the playground to the work place, almost every citizen of this nation engages in some form or another of the ridicule of friends, foes and strangers.

The speech activities that fall within the statutory definition of hazing are not limited to "fighting words," or even to obscene or opprobrious language. The

statute contains such sweeping language that almost any speech intended merely to ridicule another person may well fall within the parameters of the statutory definition. The Constitution does not allow such speech to be made a crime. The freedom of individuals to ridicule or criticize others without thereby risking arrest and prosecution is one of the principal characteristics by which we distinguish this free nation from police states.

The State trial court found that the "[h]azing statutes, as written, could be applied to circumstances where the application would reach a substantial amount of constitutionally protected free speech." (Appendix at B-9.) Thereafter, the Illinois Supreme Court attempted to limit the application of the statutes by providing for a *mens rea* requirement and a

requirement of physical injury; however, the court did not attempt to further limit the application of the statutes or to define their terms. There remain enumerable examples of speech and associational activities that may well fall within the prohibitions of the Illinois hazing statutes.

To illustrate, one can consider the potential plight of a group of "peace activists," who happen to also be college students, during last year's Gulf War. The group gathers outside the meeting place of a Veterans of Foreign Wars convention; several of the activists, in front of their companions, begin ridiculing the veterans and the military establishment, burning a likeness of General Norman Schwarzkopf in effigy, and dousing the American flag with gasoline and

setting it ablaze--all constitutionally protected activities. It can easily be said that the likely result of such actions would be some sort of tumultuous activity. The plain language of the statutes at issue seems to provide that the offense of hazing may have occurred if one of the activists is injured by an angered veteran. Is it also the crime of hazing if someone is injured by the jostling of the crowd which gathers? What if the activist burning the flag injures himself?

Similarly, could this law be used to chill the exercising of First Amendment rights by certain individuals at an abortion protest because their actions might be found by law enforcement officials to recklessly have caused tempers to flare? Could the students at Kent State University have been found to have

recklessly engaged in expressive conduct which led to the tragic incidents of National Guard troops opening fire upon the students?

Additional problems relating to both overbreadth and vagueness exist in the Illinois hazing law. First, paragraph 221, Hazing as Class B misdemeanor, provides for punishment of "[w]hosoever shall engage in the practice of hazing in this State . . ." Does this mean only those who actually organize the event or occurrence, or does it include those whose participation is limited to passive enjoyment? The statute would also seem to allow even the prosecution of the person or persons being ridiculed, especially if they were active and consensual participants. In other words, all organizers, participants, and even spectators could

come within the scope of the statutes, regardless of the extent of their individual culpability or participation in the event, and regardless of the extent that their individual participation was voluntary.

Also, there appears to be no explicit limits placed upon the causal connection between the act of ridicule and the injury suffered. Thoughts of Judge Cardozo's opinion in the classic case of Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), allow one to immediately understand some of the concerns expressed in the trial court's opinion in the instant case. Such a loose and/or unclear causation requirement is likely to have a grave and undesirable chilling effect upon free speech activities.

Vagueness

As this Court stated in Grayned v. City of Rockford, 408 U.S. 104 (1972):

> It is a basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far

> wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'

408 U.S. 104, 108-09.

Vague laws in any area suffer a constitutional infirmity, but when First Amendment rights are involved, the laws must be examined more closely less, under the guise of regulating conduct that is reachable by the police power, freedom of speech may suffer. See Ashton v. Kentucky, 384 U.S. 195 (1966).

As discussed above with regard to overbreadth, it would appear unquestionable that the hazing statutes regulate, at least in part, speech activities. As previously mentioned, the term "ridicule" by its very own definition necessarily involves speech or expressive conduct.

The vagueness analysis must begin with the question of whether or not the

statutes at issue reasonably inform the person of ordinary intelligence what is prohibited. To be so informed, the person of ordinary intelligence must be given clear notice of three fundamental elements of the statutes: (i) whose activities are regulated by the statutes? (ii) what is the nature of the activities prohibited by the statutes? (iii) when does the statute impose criminal liability for engaging in such activities? These questions have not been answered by the Illinois Supreme Court's opinion in this case.

The first question can be rephrased as "who may be arrested and prosecuted for holding up another to ridicule?" Paragraph 222 provides that those persons subject to possible prosecution under the statutes include (i) "students or other people in schools, academies, colleges,

universities, or other educational institutions of this state," and (ii) "people connected with any of the public institutions of this state." It is especially unclear who is included in the second classification of individuals. What is a "public institution of this state"? What exactly does "connected with" mean? This second classification of individuals would appear to include state and local government officials, members of the judiciary, and perhaps even an Illinois National Guard drill sergeant. Both classifications would appear to include teachers and students, but are school janitors or university groundskeepers also included? Is a performer hired by a student organization included?

No clear guidelines are given to the person trying to steer clear of the

unlawful zone, nor to the law enforcement officers and judges enforcing and applying the statutes.

The next step for the person of ordinary intelligence, determination of the nature of the conduct prohibited, is made difficult by the use of the undefined terms of "holding up," "ridicule," and "for the pastime of others." The common man of reasonable intelligence would most likely define ridicule as speech belittling another's status, opinions or deeds. Of course, the common man also believes that these are all activities he is free to engage in under the First Amendment.

The standard of holding up to ridicule is similar to the standard of "treats contemptuously," which was found to be unconstitutionally vague in Smith v. Goguen, 415 U.S. 566 (1974). Under the

statute invalidated in Smith v. Goguen, an individual was subject to criminal liability if he "publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . ." The court held that the particular flag misuse statute was vague because no clear distinction has been made between what type of treatment of the flag was or was not criminal. 415 U.S. 566, 574. In addition to the statute's failure to provide any warning or notice, the standard of "contemptuous treatment of the flag" was found to be so ambiguous that police, judges and juries were able to determine what actions were contemptuous on the basis of their personal preferences. 415 U.S. 566, 575.

The problem of determining the nature of the conduct prohibited by the Illinois hazing statutes is exacerbated by the fact

that the statutes prohibit ridicule which is engaged in "for the pastime of others." With regards to concern over discriminatory and arbitrary enforcement, how can any police officer or trier of fact objectively determine whether the purpose of the defendant's conduct was solely for his own enjoyment or amusement, or whether it was engaged in for the "pastime of others"?

Finally, the person of ordinary intelligence must determine what type of holding up of others to ridicule imposes criminal liability. In other words, when does ridicule become a criminal offense? Paragraph 221 simply provides that criminal liability attaches when "anyone sustains an injury to his person." The Illinois Supreme Court, narrowing the language of the statute somewhat, held in this case that holding up another to

ridicule becomes a criminal offense only when the activity results in the reckless, knowing or intentional injury of a person.

What remains unclear, however, is who must suffer injury before ridicule is elevated to criminality? Must the injured be the person or persons being ridiculed? What if an active and voluntary participant in the hazing activity is injured? What if the hazing activity was initiated, or set in motion, by the injured person? May the defendant also be the "victim"?

Moreover, uncertainty exists as to the causal connection between the holding up to ridicule and the physical injury requirement. Must there be direct causation, or will proximate cause suffice?

The questions raised in an attempt by the person of ordinary intelligence to determine the parameters of the particular

statutes at issue are not answered merely by relying upon the maxims that "the courts will assume that statutory words have their ordinary and popularly understood meanings" and "the English language cannot be expected to be mathematically precise." See People v. Anderson, Appendix at A-21-22.

II. THE ILLINOIS HAZING LAW IS FUNDAMENTALLY FLAWED BECAUSE THERE ARE AVAILABLE LESS RESTRICTIVE MEANS TO REGULATE THE TYPES OF ACTIVITY THAT CAUSE INJURY, BUT WHICH DO NOT IMPLICATE FREEDOM OF SPEECH AND ASSOCIATION.

Legitimate legislative goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960); see also, Elfbrandt v. Russell, 384 U.S. 11, 18 (1966).

As the Illinois Supreme Court noted in this case, the hazing statutes were "passed by the General Assembly in 1901 (1901 Ill. Laws 145) and no legislative history is available to guide us." People v. Anderson, Appendix at A-11. Any legislative goals of these statutes must

therefore be inferred. However, it is clear that the unlimited and indiscriminate sweep of the hazing statutes goes well beyond any legislative purpose which has been espoused by the State in this case or relied upon by the court below. The statutes do not just prohibit college students from engaging in hazing as it may be "popularly understood." Instead, the statutes prohibit any person "connected with any of the public institutions of this State" from engaging in any type of "ridicule" which may somehow cause any type of physical injury to a person.

The State of Illinois may well have a legitimate and substantial interest in preventing activities which create a high risk of physical harm. This is why, for example, the State's reckless conduct (Ill. Rev. Stat., ch. 38, par. 12-5) and

reckless homicide (Ill. Rev. Stat., ch. 38, par. 9-3) statutes are legitimate exercises of the State's police powers. Those particular statutes bear a direct and reasonable relationship to that interest and do not abridge any fundamental personal liberties such as freedoms of speech and association. Even assuming that the State does somehow have a legitimate and substantial public interest in treating college-age people, who engage in conduct which physically harms others in a college, university, or other institutional setting, differently, then the statutes at issue do not constitute a reasonable legislative method for accomplishing that objective. A far less drastic means for achieving such purposes, for example, would be to amend the penalty provisions of existing statutes or to add additional

considerations to the aggravating and mitigating factors to be considered by a sentencing court.

The State simply has not set forth in this case, nor has the court below relied upon, any legitimate legislative goal or purpose that cannot be achieved through legislative enactments that will have a less significant infringement upon constitutionally protected free speech activities.

III. THE ILLINOIS HAZING STATUTES CONTAIN GOVERNMENT CLASSIFICATIONS WHICH ARE VIOLATIVE OF GUARANTEE OF EQUAL PROTECTION OF THE LAWS SET FORTH IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the case at bar, the Illinois Supreme Court stated, "for a classification to be valid under . . . equal protection . . . analysis, it need only have a rational relation to a legitimate state objective." People v. Anderson, Appendix at A-28. However, whenever a statute allows some persons to speak or assemble, but not others, the law creates a classification that allocates the ability to exercise a fundamental constitutional right, and this Court should strictly scrutinize the basis for that classification. First Amendment rights are fundamental rights and, therefore, classifications relating to them should be subjected to the "compelling interest" standard of

review. See Police Department of Chicago v. Mosely, 408 U.S. 92, 101 (1972); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). See generally, J. Nowak and R. Rotunda, Constitutional Law, p. 575-76 (4th Ed.,1991).

As construed by the Illinois Supreme Court, the harm that the hazing statutes are designed to prevent is physical injury. But the hazing laws are only applicable when ridiculing speech activities are "engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this State or by people connected with any of the public institutions of this State . . ." (Ill. Rev. Stat., ch. 38, par. 222.) Therefore, the free speech limitations under the hazing statutes are applicable only to some of the people, and not to the

entire population of the State. The speech activities, including initiation ceremonies, of the Boy Scouts, Shriners or Hell's Angels are free from possible prosecution under these statutes.

To aim a statute directly at colleges and universities and others connected with public institutions, while ignoring the identically injurious practices of individuals in other groups and in other settings, is both arbitrary and irrational. Furthermore, no compelling interest of the State for the statutory classification scheme has been articulated or identified.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Docket Nos. 71877, 71878, 71879, 71880, 71881, 71882, 71883, 71884, 71885, 71886, 71887, 71888 cons.--Agenda 15--November 1991.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. MARC R. ANDERSON, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. JOHN W. BILENKO, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. JAMES A. BOYER, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. DAVID J. CAREY, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. BRIAN D. DONCHEZ, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. RAYMOND A. DREW, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. STEVE C. KADLEC, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. ANTHONY F. KOLOVITZ, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. CHRIS (C.K.) MCCRACKEN, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. MARK T. MOLZER, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. SCOTT A. ROKITA, Appellee.--THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. RIAN P SANDERS, Appellee.

Supreme Court of Illinois

April 16, 1992

CHIEF JUSTICE MILLER delivered the opinion of the court:

Defendants were charged by information with the offense of hazing (Ill. Rev. Stat. 1989, ch. 144, par. 221). The trial judge dismissed the charges, ruling the hazing statute to be unconstitutionally overbroad and vague. The State now appeals directly to this court pursuant to Supreme Court Rule 302(a) (134 Ill.2d R. 302(a)). We find the hazing statute to be constitutional and reverse the judgments of the circuit court.

The defendants are students at Western Illinois University. The amended information alleges that on or about October 19, 1990, the defendants, members of the University lacrosse club, engaged in an initiation ceremony for new members of the lacrosse club which involved the

consumption of alcohol. It is alleged that as a result of this activity, one of the initiates, Nicholas Haben, died of alcohol poisoning.

A two-count information was filed against defendants in the circuit court of McDonough County on November 2, 1990. Count I charged defendants with unlawful delivery of alcohol to a minor. (Ill. Rev. Stat. 1989, ch. 43, par. 131(a).) In count II, defendants were charged with hazing. Ill. Rev. Stat. 1989, ch. 144, pars. 221 and 222.

Defendants moved to dismiss the count II hazing charges on a variety of constitutional grounds and on the ground that the elements of the offense were not pleaded with sufficient particularity. The trial judge dismissed count II on the latter ground and took the constitutional

challenge under advisement in anticipation of the filing of an amended information by the State. The State subsequently filed an amended information. Thereafter, the trial judge again dismissed the count II charges, holding that the hazing statute was unconstitutionally overbroad and vague in violation of the first and fourteenth amendments of the United States Constitution and article I, sections 2 and 4, of the Illinois Constitution. The trial judge rejected defendants' contention that the hazing statute is void as special legislation and violates equal protection. The State now appeals. 134 Ill.2d R. 302(a).

The defendants present several constitutional challenges to the validity of the hazing statute. They first argue that it is overbroad in that it potentially

punishes constitutionally protected speech. Second, they argue that it is unconstitutionally vague because it fails to give notice to citizens that their behavior may be punishable and may lead to arbitrary and discriminatory enforcement. Finally, the defendants argue that the hazing statute violates equal protection and the Illinois Constitution's limitation on special legislation because it applies to only a limited class of people including those connected with colleges and universities, and does not apply to the general population.

The State argues that the hazing statute is not overbroad because it does not apply to much of the conduct asserted by the defendants and, in order to be unconstitutional, it must apply to a substantial amount of protected speech.

Further, the State argues that the hazing statute is not unconstitutionally vague because common-sense meanings can be attributed to its terms, and its meaning is clear as applied to the defendants' alleged conduct.

The hazing statute reads as follows:

> "Whoever shall engage in the practice of hazing in this state, whereby any one sustains an injury to his person therefrom, shall be guilty of a Class B misdemeanor." Ill. Rev. Stat. 1989, ch. 144, par. 221.
>
> "The term 'hazing' in this act shall be construed to mean any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others." Ill. Rev. Stat. 1989, ch. 144, par. 222.

Section 2 may contain an inartful definition of hazing. Our task here, however, is not to determine whether the

hazing statute was well-drafted, but to determine whether it is constitutional. We begin with the presumption that the act is constitutional. (People v. Bales (1985), 108 Ill.2d 182, 188.) Further, in construing an act of the legislature, this court must, if feasible, interpret the act in a way that preserves its constitutionality. Continental Illinois National Bank & Trust Co. v. Illinois State Toll Highway Comm'n. (1969), 42 Ill.2d 385, 389.

Overbreadth

The defendants' first argue that the hazing statute is unconstitutionally overbroad because it potentially reaches a significant amount of protected speech, thereby discouraging freedom of expression protected by the first and fourteenth amendments (U.S. Const., amends. I, XIV). Defendants argue, for example, that the

hazing statute could prevent the ridiculing of groups like the Ku Klux Klan or Neo-Nazis; the criticism of court decisions or legal theories as part of the teaching process; ridiculing political figures in speeches on campus; or teaching works of authors such as Twain, Chaucer or Shakespeare, which contain satire or ridicule of other persons.

Before addressing the legal standards of unconstitutional overbreadth, we observe that defendants' argument is based on a misinterpretation of the statute. While defendants concede that someone must receive an "injury to his person" before the statute is violated, defendants assert that the injury may be inadvertent or totally without fault of the defendant. Such an interpretation would make hazing an absolute liability offense. Defendants

also assert that "injury to his person" may be interpreted not just as bodily injury, but also as psychological trauma. We disagree with defendants' interpretations.

The hazing statute does not specify a culpable mental state, but this court will not automatically assume that the General Assembly intended an absolute liability offense when no mental state is specified. Under the Illinois Criminal Code's default provision, "[i]f the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4 [intent], 4-5 [knowledge] or 4-6 [recklessness] is applicable." (Ill. Rev. Stat. 1989, ch. 38, par. 4-3(b)). Therefore, we must first determine if the

General Assembly intended hazing to be an absolute liability offense.

Section 4-9 of the Criminal Code governs absolute liability offenses. That section states that "[a] person may be guilty of an [absolute liability offense] if the offense is a misdemeanor which is not punishable by incarceration *** or the statute *** clearly indicates a legislative purpose to impose absolute liability ***." (Ill. Rev. Stat. 1989, ch. 38, par. 4-9.) Hazing is a Class B misdemeanor with maximum penalties of six months' imprisonment (Ill. Rev. Stat. 1989, ch. 38, par. 1005-8-3(a) (2)) and a fine of $500 (Ill. Rev. Stat. 1989, ch. 38, par. 1005-9-1(a)(3)). Therefore, unless a clear legislative purpose to impose absolute liability is evident, this court will imply a mental state requirement. See

People v. Gean (1991), 143 Ill.2d 281, 286; People v. Sevilla (1989), 132 Ill.2d 113, 120.

The hazing statute was passed by the General Assembly in 1901 (1901 Ill. Laws 145) and no legislative history is available to guide us. Nevertheless, we believe it unlikely that the General Assembly intended that conduct with consequences that were no fault of defendants be punished by six months' imprisonment. Rather, we believe its intention was to deter conduct that is likely to result in injury by punishing conduct which causes injuries that could have been avoided. Thus, we conclude that hazing was not intended to be an absolute liability offense. Further, since we believe the statute was intended to deter reckless (or worse) conduct resulting in injury, we

hold that the State must prove recklessness, knowledge or intent as defined in sections 4-6, 4-5 or 4-4 of the Criminal Code of 1961 (Ill. Rev. Stat. 1989, ch. 38, pars. 4-4, 4-5, 4-6).

Defendants next argue that the phrase "injury to his person" in the hazing statute could include psychological injury. Defendants' argument compares that phrase in the hazing statute to similar language in the home invasion (Ill. Rev. Stat. 1989, ch. 38, par. 12-11) and educational intimidation (Ill. Rev. Stat. 1989, ch. 38, par. 12-7.2(d)) statutes. Such an interpretation would give the hazing statute the potential to apply whenever a person's feelings are hurt by being ridiculed. We disagree with the defendants' interpretation.

Defendants note that in People v. Ehrich (1988), 165 Ill.App. 3d 1060, the appellate court interpreted the words "any injury" as used in the home invasion statute to include psychological trauma (165 Ill.App.3d at 1072). Defendants compare this to the injury requirement in the hazing statute. We reject this argument. The phrase "any injury" (in the home invasion statute) is obviously capable of a much broader meaning than "injury to his person" (in the hazing statute). The appellate court's interpretation of the former carries no weight in this context.

Defendants also observe that section 12-7.2(d) of the Criminal Code, the educational intimidation statute, provides a private cause of action when "any person [suffers] injury to his person" as a result of a violation of the statute.

Defendants assert that a criminal violation of the educational intimidation statute does not in every case require a physical injury, and that the legislature therefore could not have intended to limit private causes of action for educational intimidation to instances where the plaintiff sustains physical injury. We reject this argument as well. First, we consider the most likely plain meaning of the statutory language "injury to his person" to be physical or bodily injury. Second, the scope of the private action clause of section 12-7.2(d) has not been decided by this court and we express no opinion on its meaning here. Finally, we consider the recent statutes cited by defendants to be poor guides in interpreting the hazing statute of 1901. A better guide is the Code that was in place in 1901. Under the

assault statute in force in 1901, assault was defined as "an unlawful attempt *** to commit a violent injury on the person of another." (Ill. Rev. Stat. 1901, ch. 38, par. 20.) The use of the word "violent" clearly suggests that the legislature of the time was contemplating attempted physical injuries when it wrote "injury on the person of another." While the phrase "injury to his person" in the hazing statute is not identical, it is similar enough that we believe the 1901 legislature again intended that it be interpreted to include only physical or bodily injury, and we interpret the phrase in that way.

The doctrine of overbreadth is designed to protect first amendment freedom of expression from laws written so broadly that the fear of punishment might discourage people from taking advantage of that

freedom. (See Broadrick v. Oklahoma (1973), 413 U.S. 601, 611-12, 37 L.Ed.2d 830, 839-40, 93 S.Ct. 2908, 2915; Gooding v. Wilson (1972), 405 U.S. 518, 521, 31 L.Ed.2d 408, 413, 92 S.Ct. 1103, 1105.) Nevertheless, the doctrine is used sparingly, and in order for a statute to be invalidated for overbreadth, its overbreadth "must not only be real, but substantial as well." Broadrick, 413 U.S. at 615, 37 L.Ed.2d at 842, 93 S.Ct. at 2918; see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982), 455 U.S. 489, 494, 71 L.Ed.2d 362, 369, 102 S.Ct. 1186, 1191.

Viewing the hazing statute interpreted correctly, it is clear that defendants' overbreadth argument fails. The hazing statute reaches only conduct which recklessly, knowingly or intentionally results

in the bodily injury of a person. Therefore, the hazing statute does not apply in any of the hypothetical situations cited by defendants. It is difficult to imagine that teaching Twain, satirizing political figures, or criticizing court opinions could result in reckless, knowing or intentional bodily injury to a person. Furthermore, because the hazing statute proscribes only conduct which results in reckless, knowing or intentional bodily injury, it is unlikely to implicate speech or conduct protected by the first amendment at all, much less do so in an overbroad manner. Thus we conclude that the hazing statute is not facially overbroad. In the unlikely event that there are situations where hazing charges could be brought against people engaging in conduct or speech protected by the first

amendment, those situations may be cured on a case-by-case basis. See New York v. Ferber (1982), 458 U.S. 747, 773-74, 73 L.Ed.2d 1113, 1133, 102 S.Ct. 3348, 3363; Broadwick, 413 U.S. at 615-16, 37 L.Ed.2d at 842, 93 S.Ct. at 2918.

Defendants also make an overbreadth argument citing People v. Wick (1985), 107 Ill.2d 62. Wick is a due process case (Ill. Const. 1970, art. I, §2) rather than one based on first amendment overbreadth, but we will address the argument here nonetheless. In Wick, this court held that the former aggravated arson statute (Ill. Rev. Stat. 1981, ch. 38, par. 20-1.1(a)(3)) was not reasonably related to its purpose because it "sweeps too broadly by punishing innocent as well as culpable conduct in setting fires." (Wick, 107 Ill.2d at 66.) Whether or not Wick was

correctly decided, we see no similar problem with the hazing statute. We do not believe that any conduct which recklessly, knowingly or intentionally injures a person is "innocent" conduct, and we believe that the hazing statute's proscriptions are reasonably related to the goal of protecting possible victims of hazing.

Vagueness

Defendants next argue that the hazing statute is unconstitutionally vague in violation of due process (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2). Two claims can be made when a law is alleged to be unconstitutionally vague: (1) that it fails to give fair warning to allow innocent people to steer clear of its prohibitions; and (2) that it contains insufficiently clear standards for those who enforce it and may lead to arbitrary

or discriminatory enforcement. (See Grayned v. City of Rockford (1972), 408 U.S. 104, 108-09, 33 L.Ed.2d 222, 227-28, 92 S.Ct. 2294, 2298-99.) Defendants make both claims.

Our first inquiry is to ascertain whether defendants were given a fair warning. Central to this inquiry is that "the statute must give a person of ordinary intelligence a reasonable opportunity to know what conduct is lawful and what conduct is unlawful." People v. Bales (1985), 108 Ill.2d 182, 188.

Defendants contend that, among others, the phrases "other people in schools" and "people connected with any of the public institutions of this state," describing to whom the hazing statute applies, are vague. We first note that defendants cannot challenge this portion

of the statute. "'A defendant *** may be prosecuted under a statute *** if his conduct clearly falls within the statutory proscription even though the statute may be vague as to other conduct.'" (Bales, 108 Ill.2d at 189, quoting People v. Garrison (1980), 82 Ill.2d 444, 454.) Defendants were students at Western Illinois University at the time the alleged hazing incident took place. The statute applies to "students *** in *** universities" and this includes the present defendants. Whether or not the statute is ambiguous as to other people to whom it might apply has no bearing on this appeal.

Defendants also challenge the phrases "pastime or amusement" and "holding up *** to ridicule." The statute does not define these terms, but in the absence of a

statutory definition, "'the courts will assume that statutory words have their ordinary and popularly understood meanings.'" (People v. Taylor (1990), 138 Ill.2d 204, 212, quoting People v. Blair (1972), 52 Ill.2d 371, 373.) Additionally, the English language cannot be expected to be mathematically precise (see Grayned, 408 U.S. at 110, 33 L.Ed.2d at 228-29, 92 S.Ct. at 2300) and we will not require the legislature to specify every activity that could be a "pastime or amusement" or in which a person might be held up to ridicule. See Taylor, 138 Ill.2d at 217 ("Due process does not require 'impossible standards' of clarity").

Webster's defines "pastime" as "something that amuses and serves to make time pass agreeably." (Webster's Third New International Dictionary 1652 (1986).)

The same dictionary defines "amusement" as "a means of *** entertaining." (Webster's, at 74.) To "hold up" is "to expose or call to attention" (Webster's, at 1079), and "ridicule" is defined as "the arousing of laughter, mockery, or scorn." (Webster's, at 1953.) We believe that these definitions concur with the popular understanding of "pastime or amusement" and that defendants' alleged initiation activity could be popularly understood as such. Additionally, we believe that defendants' actions could be fairly interpreted as holding the underclassmen up to ridicule. Thus, we hold that the hazing statute is not unconstitutionally vague as applied to defendants' conduct.

If the defendants needed further warning, they could have taken counsel

from the case of Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity (1987), 155 Ill.App.3d 231. In Quinn, the appellate court described the fraternity's activities, which included excessive drinking, as "clearly an illegal hazing activity." (Quinn, 155 Ill.App.3d at 237.) While Quinn is a civil case concerned with the tort liability of the fraternity, the appellate court held that the hazing statute was meant to apply to dangerous drinking activities such as those practiced by the fraternity.

Our next inquiry is whether the hazing statute promotes arbitrary enforcement because it lacks explicit standards. A statute so vague that it provides no guidelines for enforcement "'may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue

their personal predilections."'" Kolender v. Lawson (1983), 461 U.S. 352, 358, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855, 1858, quoting Smith v. Goguen (1974), 415 U.S. 566, 575, 39 L.Ed.2d 605, 613, 94 S.Ct. 1242, 1248.

Kolender involved a California statute that required persons "who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer." (Kolender, 461 U.S. at 353, 75 L.Ed. 2d at 906, 103 S Ct. at 1856.) The Court found that the statute allowed police "virtually complete discretion" in determining whether an individual had provided a "credible and reliable" identification, and therefore could detain people practically at their whim. Kolender, 461 U.S. at 358, 75 L.Ed.2d at

909, 103 S.Ct. at 1858; see also Papachristou v. City of Jacksonville (1972), 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (statute penalizing "rogues," "vagabonds," "habitual loafers" encouraged arbitrary enforcement).

We see no such danger of arbitrary enforcement with the hazing statute. The definition of hazing is broad, but the statute does not allow the police to make an arrest whenever they believe someone has been "held up to ridicule" as defendants suggest, nor does enforcement depend on the interpretation of any other single term in the statute. Hazing charges may be brought only when there is probable cause to believe that an activity was engaged in by students or certain other people for the purpose of holding a person up to ridicule for the pastime of others,

and the activity resulted in the reckless, knowing or intentional physical injury of a person. Certainly, police have little discretion in deciding what is and is not physical injury. This, when coupled with the other elements, narrows the conduct which could be considered a violation of the statute and circumscribes the discretion allowed to those charged with enforcing the statute. We therefore find that the hazing statute does not promote arbitrary enforcement and is not unconstitutionally vague.

Equal Protection and Special Legislation

Finally, defendants claim that the hazing statute violates equal protection (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2) and the limitation on special legislation (Ill. Const. 1970, art. IV, §13) because it applies only to

"students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state," and not to the general public.

We note first that the legislature has broad authority to make classifications for the general welfare, and its classifications are presumed to be valid. (Bilyk v. Chicago Transit Authority (1988), 125 Ill.2d 230, 236.) For a classification to be valid under either equal protection or special legislation analysis, it need only have a rational relation to a legitimate State objective. (Potts v. Illinois Department of Registration & Education (1989), 128 Ill.2d 322, 334; Bilyk, 125 Ill.2d at 236.) The State certainly has a legitimate interest in

protecting people from physical injury, and we conclude that there is a rational basis for limiting the reach of the hazing statute since it is reasonable to assume that most hazing occurs in colleges, universities and other schools. We therefore hold that the hazing statute does not violate equal protection or the limitation on special legislation. Should the legislature see fit to broaden the scope of the statute to include other possible groups, it is free to do so. The legislature need not deal with all conceivable evils at once; it may proceed one step at a time. Chicago National League Ball Club, Inc. v. Thompson (1985), 108 Ill.2d 357, 367.

For the foregoing reasons, we hold that the hazing statute is not unconstitutionally vague or overbroad, nor does it violate the constitutional provisions of

equal protection and special legislation. We therefore reverse the judgments of the circuit court and remand for further proceedings.

Judgments reversed.

IN THE CIRCUIT COURT FOR
THE NINTH JUDICIAL CIRCUIT
OF ILLINOIS, McDONOUGH COUNTY

PEOPLE OF THE STATE OF ILLINOIS Plaintiff,	)	
vs.	)	
MARC ANDERSON	)	90-CM-620
JOHN BILENKO	)	90-CM-621
JAMES BOYER	)	90-CM-622
DAVID CAREY	)	90-CM-623
BRIAN DONCHEZ	)	90-CM-624
RAYMOND DREW	)	90-CM-625
STEVE KADLEC	)	90-CM-626
ANTHONY KOLOVITZ	)	90-CM-627
CHRIS MCCRACKEN	)	90-CM-628
MARK MOLZER	)	90-CM-629
SCOTT ROKITA	)	90-CM-630
RIAN SANDERS	)	90-CM-631
Defendants.	)	

OPINION AND ORDER
DISMISSING COUNT II
OF THE AMENDED INFORMATION

On February 21, 1991, arguments were heard in the above matters on the Defendants' Motions to Dismiss Count II of the original information filed in these cases. Although this court had previously dis-

missed Count II as failing to allege necessary elements of the offense charged, the court proceeded to hear arguments on the constitutional challenge to the Illinois Hazing Statutes and granted defendants leave to apply their motions challenging the constitutionality of the Hazing Statutes to amended Count II, if filed by the People. Subsequent to the dismissal of Count II, the People filed an amended information alleging, in Amended Count II, the offense of Hazing in violation of Chapter 144, section 221 of the Illinois Revised Statutes. For reasons stated in this opinion, the court finds Chapter 144, sections 221 and 222 to be in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and to Article 1, sections 2 and 4, of the Constitution of

the State of Illinois 1970, and Count II of the Amended Information is, therefore, dismissed.

OPINION

Through their various motions, the defendants have challenged the constitutionality of Chapter 144, sections 221 and 222, Illinois Revised Statutes (1989) (hereinafter referred to as the "Hazing Statutes") and have claimed that the hazing statutes are in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1, sections 1, 2, 4, 5 and 24 and Article 4, section 13, of the Constitution of the State of Illinois 1970. The defendants advance three arguments to support their challenge to the constitutionality of the Hazing Statutes. The first argument is that the

Hazing Statutes are unconstitutional due to overbreadth. The second argument is that the Hazing Statutes are unconstitutional due to vagueness. The third argument is that the Hazing Statutes are unconstitutional as a denial of equal protection and as being special legislation. (The latter position requires the same consideration even though two separate principles are involved.)

It is necessary that this court begin its analysis of the constitutional issues with the presumption that the statute is constitutional. People v. Schwartz, 64 Ill.2d 275, 281 (1976); People v. Gurell, 98 Ill.2nd 194 (1983). All reasonable doubts should be resolved in favor of upholding the validity of the statute and determining legislative intent. People v. Scott, 57 Ill.2d 353, 358 (1974). It

should also be assumed that the words contained in the statute should have their ordinary and popularly understood meanings in absence of contrary legislative intent. Farrand Coal Co. v. Halpin, 10 Ill.2d 507, 510 (1957). However, even with the existence of these presumptions, this court does not believe the Hazing Statutes can be saved from the constitutional mandates. To provide the parties with the reasoning for my decision, I will comment on each argument of the defendants.

The defendants' first argument is centered on the proposition that the Hazing Statutes violate the constitutional principles of freedom of speech and expression and, because section 222 which defines the act of hazing is so broad in its language, that statute has a chilling effect on the activities of those persons

associated with educational institutions. As examples, the defendants argue that the provisions of section 222 will prevent certain persons from (a) ridiculing or criticizing extremist organizations such as the Ku Klux Klan or Neo-Nazis; (b) criticizing court decisions or legal theories advocated by fellow attorneys or professors as part of the teaching process in law schools or in undergraduate courses; (c) giving speeches or presenting performances on college campuses during which any other person, including a political figure, may be ridiculed for decisions made or positions advocated; (d) engaging in homecoming rallies and parades where ridicule may be directed at opposing team members; or (e) teaching works by authors such as Mark Twain, Chaucer or Shakespeare where those works may criti-

cize other persons or hold them out to ridicule.

The state counters with the argument that such conduct would not be subject to criminal charges as the law must be applied in a common sense approach and the State's Attorney's Office in McDonough County would not attempt to file such a charge. The state further argues that no fundamental right is proscribed by this law in that the Hazing Statutes only prohibit conduct which results in injury.

Reviewing the authorities provided the Court in support of each argument, this Court must determine whether the Hazing Statutes reach a substantial amount of constitutionally protected conduct. If the statutes do not, the overbreadth challenge must fail. If the statutes do reach a substantial amount of constitutionally

protected conduct, the overbreadth challenge should succeed and the statute should be declared unconstitutional. See, for example, Gooding v. Wilson, 405 U.S. 518 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Winters v. New York, 333 U.S. 507 (1947); NAACP v. Button, 371 U.S. 415 (1963); and Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982). Free speech intermingled with illegal conduct does not, per se, result in constitutional protection for the illegal conduct, Cox v. Louisiana, 379 U.S. 559 (1965). A law which reaches a substantial amount of protected conduct could be unconstitutional and facially invalid even though it is addressed to a legitimate purpose. Houston v. Hill, 482 U.S. 451 (1987).

In this Court's opinion, the Hazing Statutes, as written, could be applied to circumstances where that application would reach a substantial amount of constitutionally protected free speech. Many situations can be envisioned wherein a person's conduct would fall within the definition of hazing found in section 222. As one example, if a comedian gives a performance at a university during which he ridicules Vice-President Dan Quayle, the individual may have committed an act of hazing. If any person sustains "an injury to his person" as a result of this "hazing," the performer may be subjected to criminal prosecution and, possibly, six months in the county jail. In this court's opinion, the conduct engaged in by the comedian is protected speech and constitutes the very conduct protected by tie

First Amendment. We have the privilege to be able to criticize or ridicule public officials, criticize or ridicule friends, associates, business acquaintances, and others without fear of reprisal through a criminal prosecution and penalties.

The People's argument that hazing only occurs when an injury is suffered does not save the hazing statutes from the constitutional challenge. The elements of section 221 which include the requirement of an "injury" are not applicable until it is first determined whether or not an act of hazing occurred in the first instance. "Hazing" may occur with or without an accompanying injury and the injury may have been intended or merely accidental. Criminal prosecution may only occur when there has been injury.

For example, a person could commit an act of hazing by using the most profane language or by pursuing the most heinous course of conduct and yet, if no one is injured, no criminal violation has occurred. Yet, another person could make a single remark in the ridicule of another, and, if injury is associated with that remark, a violation of the hazing Statute appears to have occurred. The person who followed the most despicable course of conduct is not subject to criminal penalty but the person who uttered a somewhat innocent remark could be subject to incarceration.

The restrictions imposed by the Hazing Statutes on a person's constitutional right to express himself are not insignificant and these restrictions are greater than is essential to accomplish

the government interest. U.S. v. O'Brien, 391 U.S. 367, 376-377 (1968) and People v. Bossie, 108 Ill.2d 236 (1985). It is, therefore, my opinion that the Hazing Statutes must be declared unconstitutional as being overly broad and facially invalid as affecting a substantial amount of protected free speech.

Even if I had determined the hazing statutes do not unconstitutionally interfere with the freedom of speech, I would still declare the hazing statutes unconstitutional due to vagueness. The constitutional challenge for vagueness is addressed to the principle that an ordinary person should not have to speculate on the meaning of a statute at the peril of his life, liberty or property. People v. Bossie, 108 Ill.2d 236 (1985). If men of common intelligence must necessarily guess

at the meaning of a statute, the statute is void as being unnecessarily vague. No person should be held criminally responsible for conduct which he cannot reasonably understand to be prohibited. Palmer v. Euclid, 402 U.S. 544 (1971).

The defendants argue that the hazing statutes are unconstitutionally vague. What is ridicule? What does "holding up" require? What does "connected" with the university mean? What does "an injury to his person" mean? Must there be a direct relationship between the injury which results from the hazing act and the act of hazing itself? Is scienter required? For example, the defendants submit that a criminal offense would be committed even though the injury which occurred was totally unrelated to the actual act of hazing. The defendants cite as an example a

situation where a person is ridiculed by a comedian during a performance at a university and during this performance someone falls off the stage and is injured. Would the hazing statutes apply in a case where the injury was not sustained by the person who was the object of the hazing or where the injury was not caused by the person that performed the hazing act? The state argues that the intent of the hazing statute is to prevent injury. Such an intent is certainly a legitimate interest of the state and no one has a constitutional right to cause injury to another. However, the language of the Hazing Statutes is so vague that the statutes authorize criminal prosecution that is not essential to achieve the state's legitimate interest.

Criminal statutes are subject to the strictest interpretation. The presence or absence of scienter will exacerbate any uncertainty that may exist. Colautti v. Franklin, 439 U.S. 379 (1979). The purpose of the vagueness doctrine is to insure that the law would be easily understood by the ordinary citizen, that the law would not be enforced in a variety of circumstances depending solely on the discretion of the police, the judge, the jury, or the prosecutor, and the law should be at least specific enough to establish standards for those that apply the law.

The State argues that they would not enforce the law in those circumstances described by the defendants. However, this is exactly what the vagueness doctrine contemplates to prohibit, i.e. the

arbitrary decision by a prosecutor, a police officer, a judge or a jury to charge or convict persons of offenses without having to adhere to specific language of the statute and by using their own interpretations and common sense. It is the lack of a scienter requirement in the Hazing Statutes that allows the statute to sweep too broadly and punish innocent as well as culpable conduct. See People v. Wick, 107 Ill 2d 62 (1985). Under the current Hazing Statutes, an injury may be intended, it may have been foreseen, it may be expected or contemplated, it may have been unforeseen, unexpected, or it may be totally inadvertent. It is this Court's opinion that without a requirement of scienter, the Hazing Statutes are unconstitutionally vague.

The third argument that the defendants present is that the hazing statutes are unconstitutional as special legislation and constitute a denial of equal protection. The defendants attack section 222 which limits hazing to educational institutions. The State counters with the argument that the statutes are reasonably related to the environment where most hazing occurs.

The defendants further argue that the definition of hazing in section 222 only applies to state supported institutions and is therefore more limited in its application. However, it seems that courts could interpret that statutory language and, if necessary, construe the statute to avoid the constitutional challenge of denial of equal protection or special legislation.

The burden is on the party attacking the classification as arbitrary, unreasonable, and bearing no rational relationship to legitimate government interest. The Hazing Statutes are not in violation of the constitutional principles just because they apply to a certain limited group. People ex rel. Difanis v. Barr, 83 Ill 2nd 191 (1980)1 People v. Gurell, 98 Ill.2d 194 (1983); Bilyk v. Chicago Transit Authority, 125 Ill 2d 230 (1988). In order for a law to be found unconstitutional as special legislation or as a denial of equal protection, the court must find that there is no reasonable or rational connection between the law as applied to a small group of people as opposed to the law as applied to the public at large. In this Court's opinion, it is reasonable to apply Hazing Statutes to

activities at educational institutions as hazing does not usually occur in organizations or institutions frequented by the public at large.

The defendants' Motion to Dismiss Count II on constitutional grounds of denial of equal protection or as special legislation should be denied.

As a final comment, it should be noted that there is no reported Illinois case addressing the constitutionality of the Illinois Hazing Statutes. There is no Illinois case reporting criminal prosecutions under the Hazing Statutes. The only reported case in the nation appeared in New York Courts in People v. Lenti, 260 N.Y.Supp.2d 284 (1965). The New York Court declared their hazing statute invalid but that statute did not contain a definition of hazing. The decision of the

New York Court does not provide much guidance in these cases. These cases must be decided on constitutional principles.

This ruling should not be construed as an approval or a condonation of the defendants' actions. This ruling is not based on any evidence in these cases. Ridicule or injury to others should never be approved or accepted in our society. On the other hand, the Constitution of the United States and the Constitution of the State of Illinois were written as a protection for all citizens, including those accused of criminal law violations. I would be remiss in my responsibilities and would be in violation of my oath of office if I chose to ignore those constitutional principles in cases where I believe the statutes are fatally flawed. The courts should not, and cannot, draft legislation.

That power or responsibility is reserved to the legislature. Perhaps the legislature will take action to redraft the Hazing Statutes in an effort to prevent the tragic result that occurred in this case.

ORDER

For the foregoing reasons, the defendants' Motions to Dismiss Count II of the Amended Information is granted.

ENTER: April 10, 1991

s/Ronald C. Tenold
JUDGE RONALD C. TENOLD